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No. 76-898

In The
Supreme Court of the United States

OCTOBER TERM, 1976

ADRIAN WILSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY OF PETITIONER, ADRIAN WILSON, TO BRIEF FOR THE UNITED STATES IN OPPOSITION MAILED ON MARCH 29, 1977 AND RECEIVED APRIL 1, 1977.

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I

ERRONEOUS OR IGNORED FACTS IN REPLY BRIEF.

Certain statements which the Solicitor General alleges to be facts are simply incorrect. The record clearly discloses that Miro Mizera solicited Wilson to obtain a listing for the Nevada property which Wilson owned. He, in fact, called Wilson's Attorney in Los Angeles in order to contact Mr. Wilson. Furthermore, Mizera clear-

ly testified at the trial that the rezoning and offering of the campaign contribution to the Commissioners was his idea; that he believed he was doing nothing wrong and that Wilson was innocent. The testimony of Mizera to the effect that he desired to give Broadbent a campaign contribution, if there was a legal way to do so, stands uncontroverted by the Solicitor General, as does the statement at Page 9 in Petitioner's application that Broadbent became an Agent of the State of Nevada on April 21, 1972. It is not denied, in any way, that Broadbent, at the suggestion of the Attorney General, told Mizera many things as they came up and undertook acts to move along the alleged plot at the suggestion of the Attorney General of Nevada, including a willingness to cooperate with Mizera, to accept money from him, to vote for rezoning against his true beliefs, and even to mislead one of his Co-Commissioners in order to get that Commissioner to vote for zoning so that Ryan would accept moneys. He also quotes from the Opinion of the District Court Judge relating to the local lawyer who advised the Commissioners of what was going on as a justification for the coercion of Mizera. That local attorney was, in fact, William Morris, who had been Wilson's Attorney and had gotten out of the case because of the actions of the Agent of the State.

II

PREDISPOSITION HAS NEVER BEEN CONCEDED NOR FOUND BY A JURY IN THIS NON-CONTRABAND CASE.

As hereinafter set forth, Wilson does not concede any predisposition on his part to commit the crime with which he was charged. However, as stated by Justice Powell in *Hampton v. United States* (1976), ... U.S.

..... 48 L.Ed.2d, 113, 120, the United States Supreme Court has not yet had occasion to confront government overinvolvement in areas outside the realm of contraband offenses. It should also be noted that in *United States v. Russell* (1973), 411 U.S. 423; 36 L.Ed.2d 366, the jury found predisposition and an entrapment instruction had, in fact, been given by the Court [411 U.S. 426, Footnote 4]. In Hampton predisposition had been conceded [48 L.Ed.2d 117, Footnote 3]. In the present case, the brief of the United States focuses on a portion of the actions of the Nevada Attorney General in compelling Mizera to become an Agent of the State. It ignores the failure to give the entrapment instructions requested by Wilson, one of which was clearly in conformance with the subjective theory of entrapment under any reading, and is clearly set forth as an issue which remains unaddressed by the Solicitor General.

The Solicitor General concedes that Broadbent was an Agent of the State from April 20, 1972 and that it was his action, with the knowledge of the Nevada Attorney General, which caused the removal of Wilson's Attorney, William Morris. However, in adopting the theory of the Court below, the Solicitor General dismisses such action as the independent act of the Agent of the State and refers to it on Page 12 of his Brief as a "caution" to Morris.

As pointed out in Petitioner's Brief, at Page 10 thereof, Broadbent told Morris to get out of the case, to keep his mouth shut and to conceal from his client the reason for his getting out of the case. Morris was led to believe that such action was necessary to capture Mizera, who Morris thought, because of Broadbent, was the subject of the investigation. With respect to his client, Morris followed the instructions of Broadbent to the letter. Not-

withstanding his reliance on the statement of the Court below relating to the independent acts of Broadbent, the Solicitor General cites no case which would support this proposition and does not, in any manner, distinguish *Sherman v. U.S.* (1958) 356 U.S. 369, 375, or *Johnson v. U.S.* (D.C. Cir. 1963) 317 F2d 127, 128-30, which hold that the Government may not make use of an Agent and then claim disassociation through ignorance of his acts. The Government's position relating to acts of Broadbent fly in the face of general rules as to the acts of an Agent. In any event, it is absolutely clear that, because of the record and concessions of the Solicitor General, that Broadbent was at all times an Agent of the Nevada Officials and that the Nevada Officials knew on a daily basis of his actions. At no point has this Court said that the act of such Agent could be disavowed by his principal, the Government. Such a position cannot and does not represent the state of the law. If the Government accepts the fruits of the acts of such an Agent, it must be deemed to be bound by his actions. In any event, the Solicitor General concedes, as he must, that the Nevada Officials knew within one week of April 27, 1972 that Morris had been removed because of the acts of their Agent and, of course, Mizera's conversations had been recorded by the Attorney General, who was apprised daily of all developments in the case. See Wilson's Petition, Page 10.

The Solicitor General does not attempt to sustain the position taken by the reviewing Court to the effect that Wilson waived the giving of an entrapment instruction by failure to object. He cannot sustain the Court's position because the record below does not support a waiver. However, says the Solicitor General, the Court carefully perused the record and determined that the claim of entrapment was without substance. The Court's perusal, while characterizing Wilson's arguments relating to the

Attorney General's acts against Mizera as "faint", concedes that if they forced Wilson to commit a criminal act that there would have been entrapment under the rule of *United States v. Russell* (1973) 411 U.S. 423.

The balance of the Brief is directed to the question of whether the acts of the Nevada Officials toward Mizera resulted in entrapment under the objective approach and concluded that such acts, although not condoned by the Court, and not good police work, did not violate Wilson's rights.

Furthermore, the Solicitor General did not disagree with the Petitioner's arguments to the effect that at least one of the instructions proferred is subjective, rather than objective, since Wilson's "F" was clearly based upon *Sherman v. United States,* supra, and upon *Devitt and Blackmar,* Section 13.13.

Though alleging that Wilson was predisposed because, as early as January of 1972, the plot allegedly had been undertaken, no discussion is had relating to the act of wrongfully removing Wilson's Attorney subsequent to April 27, 1972 before the commission of the act, under which jurisdiction is laid in the Federal Court. The Solicitor General ignores the concurring opinion of Justice Powell in *Hampton,* supra, to the effect that in a non-contraband case, the conviction of a predisposed defendant may be barred as a matter of due process. He concedes that the record clearly does not bear out the conclusions of the Court below to the effect that Morris had been advised by Mizera at or before the time he was retained with respect to the plot. He concedes that, as the record clearly discloses, Wilson was going to pay his Attorney $10,000 to undertake representation before the administrative Board of Commissioners in order to obtain rezoning in a legal way and that to offer additional

moneys amounting to virtually the same sum as that allegedly to be paid through Mizera makes no sense. Is it not clear, therefore, that Morris' instruction and representation were the true reasons for his removal from the case? It makes no sense to disavow acts of Broadbent in removing Morris and yet to say Mizera's statements to Broadbent about Wilson paying for the Commissioners binds Wilson as evidence of predisposition. Why would the Nevada Officials, within a week of the removal of Morris, say it was just as well that he had been taken from the case? It was because Broadbent and the Attorney General knew that a strong likelihood existed that the Commissioners would permit the rezoning on the basis of the case to be presented by Morris on the merits without any bribery. The point is that, neither the analysis of the Court below, nor of the Solicitor General consider that the removal of Morris must also be considered in determining both the subjective and objective standards enunciated by *Russell*. But, says the Solicitor General, even if there were no waiver of entrapment instructions, and even if they were proper, the instructions may not be given because in January of 1972 Wilson had agreed that the Commissioners be approached with an offer of monetary assistance. If one reads Mizera's testimony of the original offer to Broadbent, it was clearly not seeking to bribe him. Furthermore, had there been given appropriate entrapment instructions, argument could well have stressed that the critical period of the involvement commenced on April 20, 1972, when, so far as is known, Broadbent, who believed that campaign contributions were made by people with special interests, suddenly became of the opinion that an offer of bribery was being made to him by Mizera.

Since it must be conceded that predisposition is a question of fact and that the holdings of *Russell* and of

Hampton, supra, concur on this point, Wilson has been unable to argue to the jury and the jury has been precluded from finding whether or not Wilson was predisposed. This is so because clearly any predisposition had been terminated on April 27, 1972 when Morris was retained as an attorney to perform the act of obtaining rezoning in a lawful and legitimate way. The failure to give entrapment instructions also prevented the jury from finding that the idea for the commission of any crime was implanted by the government at and after the removal of Morris.

Obviously, the prosecutor would argue that Wilson's intent to pay moneys to the Commissioners never ended. This does not take away from the jury its function of finding the truth and making the determination of whether or not predisposition existed. Neither *Russell* nor *Hampton* hold that the Court will decide the question of predisposition as a matter of law. The argument of the Solicitor General which hangs upon the quoted statement of the obviously unstable Mizera as to predisposition ignores the fundamental reason for giving the entrapment instruction. When Wilson hired Morris, any predisposition to commit the crime terminated. The actions of Broadbent were the cause of the removal of an Attorney who would lawfully have obtained the zoning and it was these acts, coupled with other acts of the Attorney General against Mizera, Wilson's Agent, which make this the case set forth in *Russell,* requiring the utilization of the objective approach by the Court, as well as the giving of an entrapment instruction utilizing the subjective approach. One need only ask the Solicitor General, or any member of the Department of Justice, if they would have acted in the manner in which the Attorney General acted toward Mizera, or whether they would have condoned the removal of the Attorney for

Wilson after having had intimate knowledge of his removal, and of the acts of Broadbent under the direction of the Nevada officials and his statements that no Attorney was needed.

III

THE SOLICITOR GENERAL IGNORES THE QUESTION OF WHETHER, UNDER THE FACTS OF THIS CASE, THE TRAVEL ACT SHOULD HAVE BEEN UTILIZED.

The United States does not distinguish, or explain, in any manner, *United States v. Isaacs,* (7th Cir. 1974) 493 F2d 1124, 1146, 1147, *United States v. Archer,* (2nd Cir. 1973) 486 F2d 670 or *United States v. Altobella,* (7th Cir. 1971) 442 F2d 310 all of which involve participants and two of which involve bribery and which hold that the Travel Act should not be utilized. He concedes the only argument for prosecution in Federal Court is because of Wilson's incidental residence in California and the failure of the Nevada Attorney General to advise and enlist the help of the District Attorney of Clark County in the prosecution so that timely prosecution could have been commenced in the local State Courts by the State authorities, who were competent to and capable of prosecution. Nor does the Solicitor General consider the history and the aim of the Travel Act against organized crime as is set forth in *Rewis v. United States* (1971) 401 U.S. 808 and his footnote 10 is incorrect to the extent that he concludes the Travel Act was directed toward the facts of this case.

IV

CONCLUSION.

The actions of the Nevada Officials in removing Wilson's Attorney and in proceeding as they did against Mizera cannot be compartmentalized. The acts clearly are government overinvolvement in a non-contraband situation, which should bar proceeding against Wilson even if he had been predisposed. However, Wilson has not conceded predisposition. When the Court refused to give the jury instructions which he offered, or to modify them so as to conform to what is believed to be the rule in *Sherman v. United States* (1958) 356 U.S. 369, Wilson was effectively barred from having a jury determine the issue of predisposition. In any event, there was absolutely no reason to interfere with sensitive Federal State relationships by prosecuting this matter in the Federal Courts. Accordingly, the request for the writ of Certiorari should be granted.

Dated: April 7, 1977.

VARGAS, BARTLETT & DIXON

By JOHN C. BARTLETT

BAKER, ANCEL and REDMOND

By MARK G. ANCEL
Attorneys for Petitioner Wilson

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

Robert H. Coker, Jr., being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 1706 S. Maple Avenue, Los Angeles, California, 90015.

That on April 11, 1977, affiant served copies of the within
Petition for a Writ for Certiorari to the United States Court of Appeals for the Ninth Circuit upon persons named below:

By courier services;

United States Supreme Court United States Supreme Court Building 1st Avenue, N.E. Washington, D. C. 20549	1 original and 39 copies
Solicitor General Department of Justice 9th and Pennsylvania Avenue, N.W. Room 5143 Washington, D. C. 20530	3 copies

By mail;

Lawrence J. Semenza United States Attorney 300 Las Vegas Boulevard, South Las Vegas, Nevada 89101	3 copies
Richard A. Wright Asst. United States Attorney 300 Las Vegas Boulevard, South Las Vegas, Nevada 89101	3 copies

That there is a regular communication by mail between the place of mailing and the place so addressed.

Robert H. Cohen Jr.

Subscribed and sworn to before me
this 9th day of April, 1977

Lawrence E Hieger

Notary Public in and for the
State of California

OFFICIAL SEAL
LAWRENCE E. HIEGER
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 20, 1978